Petition

81-898

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL THEVIS - - - - - **Petitioner**

versus

URBAN INDUSTRIES, INC.,
WESLO, INC.,
MERCHANTS AND BUSINESSMENS MUTUAL INSURANCE CO.,
BITUMINOUS CASUALTY CORP.,
FIREMAN'S FUND INSURANCE CO., and
NEWARK INSURANCE CO. - - **Respondents**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Was it prejudicial error to permit the jury's mammoth award of punitive damages to Respondents as subrogees, pursuant to subrogation clauses of insurance policies, when the subrogor was awarded punitive damages in its own right?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals decided and filed on February 9, 1981.

OPINION BELOW

The opinion of the Court of Appeals decided and filed on February 9, 1981 (Appendix A) is reported at ___ F. 2d ___ (6th Cir. 1981). A Petition for Rehearing *En Banc* was timely filed. The order denying the Petition for Rehearing *En Banc* was entered on September 10, 1981.

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was filed on February 9, 1981. A timely Petition

for Rehearing was denied on September 10, 1981. This Court's jurisdiction is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On the 2nd day of October, 1975, Respondents, Urban Industries, Inc., Weslo, Inc., Merchants and Businessmen's Mutual Insurance Company, Bituminous Casualty Corporation, Fireman's Fund Insurance Company, and Newark Insurance Company, filed a Complaint in Jefferson County, Kentucky Circuit Court alleging, in part, that Petitioner Thevis, acting alone or in concert with others, did willfully, maliciously and criminally cause a fire to be set at 4708 Pinewood Road, Louisville, Kentucky. The cause was removed from Jefferson County Circuit Court to the United States District Court for the Western District of Kentucky at Louisville upon Petition of the Petitioner on October 4, 1975.

In the case at bar, Respondent Urban Industries, Inc., was the owner of the business located at the site of the alleged arson. Respondent Weslo, Inc., was the owner of the building where the alleged arson allegedly transpired. The remaining Respondents, Merchants and Businessmen's Mutual Insurance Company, Bitu-

minous Casualty Corporation, Fireman's Fund Insurance Company, and Newark Insurance Company, are parties to the instant litigation solely by reason of subrogation. They are subrogees by virtue of various policies of insurance to the claims of their insureds, Urban Industries, Inc. and Weslo, Inc.

In the original claim for relief only Urban Industries, Inc. prayed for an award of punitive or exemplary damages. On the 9th day of March, 1978, Weslo, Inc., Merchants and Businessmen's Mutual Insurance Company, Bituminous Casualty Corporation, Fireman's Fund Insurance Company, and Newark Insurance Company moved the District Court, pursuant to FRCP 15, to permit an amendment to the Complaint so as to include a prayer for punitive damages in their respective behalves. By Order of the Court, the amendment to the Complaint was permitted with the Petitioner not being required to file any responsive pleading thereto. The Order further provided that the allegations contained in the Amended Complaint would be considered controverted by the Petitioner.

After both sides had completed their proof the District Court submitted to the jury an instruction on punitive damages in behalf of the various subrogee insurance companies. The Petitioner respectfully submits that these insurance companies, as subrogees, were only entitled to compensatory damages and, if anything, a compensatory award.

On the 21st day of April, 1978, the jury returned its verdict in favor of the several Respondents. The verdict not only included the prayed for compensatory

damages, but also a punitive award to Urban Industries, Inc. of $200,000.00, a punitive award to Weslo, Inc., of $19,332.00, and a punitive award to the several subrogee insurance companies totalling $408,902.00. The total award was $674,557.54.

The District Court entered its judgment mirroring the jury verdict on May 1, 1978.

On the 11th day of May, 1978, the Petitioner filed a timely Motion for a Judgment Notwithstanding the Verdict or in the Alternative for a New Trial with a Memorandum of Authorities in support thereof. On the 20th day of June, 1978, Respondents filed their response. A reply to Respondents' response was filed on July 13, 1978. The District Court rendered its Memorandum Opinion and Order overruling the Motion for a Judgment Notwithstanding the Verdict or in the Alternative for a New Trial on the 13th day of July, 1978.

Petitioner perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit arguing, in relevant part, that the insurance companies, as subrogees, were not entitled to the jury's award of punitive damages.

The opinion of the Court of Appeals affirming the judgment of the District Court was filed on February 9, 1981. The order denying Petitioner's Petition for Rehearing *En Banc* was filed on September 10, 1981.

ARGUMENT

Prejudicial error was committed by the Court of Appeals' affirmance of the District Court opinion up-

holding the mammoth award of punitive damages to Respondents as subrogees, pursuant to subrogation clauses of insurance policies, when the subrogee was awarded punitive damages in its own right.

In the original claim for relief filed in the within action, only Respondent Urban Industries prayed for an award of exemplary or punitive damages. On the 9th day of March, 1978, Respondents Weslo, Inc., Merchants and Businessmen's Mutual Insurance Company, Bituminous Casualty Corporation, Fireman's Fund Insurance Company, and Newark Insurance Company moved the District Court, pursuant to FRCP 15 to permit an amendment to the original Complaint so as to include a prayer for punitive damages in their respective behalves. By order of the Court, the amendment to the Complaint was permitted with the Petitioner not being required to file any responsive pleading thereto. The order further provided that the allegations contained in the amended complaint would be considered controverted by the Petitioner.

On the 21st day of April, 1978, the jury returned its verdict awarding, in part, the Respondent Insurance Companies, as subrogees, a collective amount for punitive damages of $408,902.00. The punitive award to the above mentioned subrogee insurance companies represents an amount ten (10) times the amount awarded for compensatory damages.

On the 11th day of May, 1978, Petitioner filed a Motion with supporting Memorandum for a judgment notwithstanding the verdict or, in the alternative, for a new trial, arguing, inter alia, that the aforementioned

punitive award was manifestly improper and should be set aside. The Respondents filed their response thereto on June 20, 1978. The District Court, after having considered the issue sub judice in its Memorandum Opinion, entered an Order overruling Petitioner's motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

As expressed in the Memorandum Opinion rendered by the District Court on July 13, 1978, this issue concerning punitive damages ". . . raises some interesting and novel questions of law." (Appendix B). Within the opinion it is admitted quite frankly that neither the court nor the parties have been able to come up with any case directly in point from Kentucky. (Appendix B). Yet, the trial court allowed a jury verdict to stand which awarded compensatory damages to each of the six Respondents herein, and, in addition, awarded punitive damages to each of the six Respondents. Petitioner respectfully submits that the award of punitive damages to the four Respondent Insurance Companies, as subrogees of the two other parties, Weslo, Inc., and Urban Industries, Inc., pursuant to the subrogation clauses of the insurance policies, was manifestly improper. Clearly, the substantive law of Kentucky reveals the lower court's decision to allow the award of punitive damages to both subrogors and their respective subrogees as being in error.

Petitioner does not contest the purpose of punitive damages as set forth in *Ashland Dry Goods Co.* v. *Wages,* Ky., 195 S. W. 2d 312 (1946), namely, to

punish the defendant and deter the defendant and others similarly inclined from outrageous conduct in the future. Petitioner merely suggests that a punitive award to a subrogee insurance company is highly improper especially when the subrogor is awarded punitive damages in his own right.

The District Court relied heavily upon *Federal Deposit Insurance Corp.* v. *Wilhoit,* Ky., 180 S .W. 2d 72 (1943). In *Federal Deposit Insurance Corp.* v. *Wilhoit, supra,* the Kentucky Court of Appeals merely held that FDIC was subrogated to the rights of the depositors of a closed bank and was entitled to interest on money it had made available to those depositors. However, allowing a subrogee to collect interest on its payments to such depositors in no way justifies the quantum leap of allowing a massive award of punitive damages to a subrogee in a case such as we are herewith confronted. None of the depositors in *Federal Deposit* were plaintiffs to the action, nor were punitive damages an issue in the case. The trial court and Court of Appeals failed to recognize the subtleties rooted in the basic law of subrogation in addition to incorrectly ascertaining the proper parties entitled to punitive damages, namely, the parties directly injured by a putative defendant's tortious conduct as opposed to those parties which derive their cause of action through contractual or conventional subrogation.

A brief exercise in review of applicable Kentucky substantive law clearly demonstrates the prejudicial error.

Subrogation originated in equity and is a creature of equity. Its object is the prevention of injustice and its basis is the doing of complete, essential, and perfect justice between all parties without regard to form. 83 C.J.S., *Subrogation,* §2.

Black's Law Dictionary, Revised 4th Ed. (1968), begins its lengthy definition of subrogation as follows:

> [T]he substitution of one person in the place of another with reference to a lawful claim, demand or right, [citations omitted] so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities [citation omitted]. Black's, p. 1595.

Clearly, in the ordinary meaning of the words, the definition of "substitute" or "succeeds" contains the underlying assumption that both subrogor and subrogee are not entitled to a recovery from the same creditor or tortfeasor. This is to simply say, (disregarding the issue of the assignability of a claim for punitive damages for the present) that if both are allowed to collect punitive damages concurrently, no substitution is involved.

To demonstrate that Kentucky follows the definition set out above, a quote from the case of *FDIC* v. *Wilhoit, supra,* is helpful.

The word "subrogation" simply means substitution for another. It is the legal operation by which a third person who pays a creditor succeeds to his rights against a debtor. *Id.,* at 76.

For our discussion, the distinction between conventional subrogation and equitable subrogation is irrelevant. The former is available to an insurer by virtue of an express clause in the policy, the latter is implied by law, available without finding expression in contract.

Respondents argued below that the subrogee insurance companies received a valid assignment to collect damages of their insureds caused by the acts of the Petitioner (the fact is stipulated in the record). Yet, this fact only goes to support Petitioner's contention as to punitive damages. If something is assigned, due to the very nature of an assignment, how can it still reside in the assignor? On the very basis of Respondent's assertion, it is apparent that the award of punitive damages is correct, if at all, either to the subrogors or to the subrogees in the case at bar, but not as to both. Subrogation correctly allows an insurance company to "stand in the shoes" of its insured. However, the Respondent Insurance Companies were permitted to "stand in the shoes" of the insured while their insured was still in those same "shoes." If the opinion of the Court of Appeals is allowed to stand, it would theoretically be possible to award punitive damages to an almost infinite number of plaintiff-subrogees on the basis of one act directly injuring one subrogor if the injured insured has elected to enter into multiple insurance policies with various carriers. In the case at bar, both subrogors and subrogees were named plaintiffs. Subrogor exercised the right to seek punitive damages. The exercise of that right by subrogor should deny subrogee the right to seek punitive dam-

ages, regardless of the fact that a subrogee may in some circumstances seek punitive damages where the subrogor could do (but has not done) so. An opposite holding would result in two recoveries against Petitioner for punitive damages where, under a subrogation theory, there is but one right to recover such damages. To utilize the phraseology of the Kentucky courts, to permit the subrogee to recover punitive damages where the subrogor has sought and recovered such damages, would be to expand the right of the subrogee so that which is complete would be made more complete. *Federal Deposit Insurance Corp.* v. *Wilhoit, supra,* at 76.

Although punitive damages were not involved, the Kentucky Court of Appeals in *Bratton* v. *Speaks,* Ky., 286 S. W. 2d 527 (1956), helpfully described an insurance company's entitlement to subrogation.

> It is the recognized rule that when an insurance carrier has paid the insured the loss for which it had agreed to indemnify him it becomes subrogated to any claim for the same damages which the insured might have recovered from the wrongdoer causing the damage. [Emphasis added.] *Id.*

Respondents cited *Bratton* in their response to Petitioner's motion for judgment NOV or for a new trial in support of their contention that punitive damages can be awarded to insurance companies as subrogees. However, this "support" is totally unfounded. *Bratton* actually supports Petitioner's position. In said case, the Kentucky Court of Appeals did not state that an insurance carrier, as a subrogee, becomes subrogated

to any claim for the same damages which the insured can or did recover from the wrongdoer. Rather, by expressly using the language "might have recovered," the import of that court's statement is clear. The gist of the statement contains the underlying assumption that either the subrogor or the subrogee can recover damages, but certainly not both parties.

Recognizing the inherent flaw within their theory of receiving punitive damages through subrogation, Respondents tried to shore up their argument by maintaining that they acquired a nonderivative right to collect punitive damages from Petitioner by reason of Petitioner's intentional tort committed directly against said insurance companies. Such an assertion surpasses the boundaries of reason and common sense. As previously stated, each of the insurance companies sued the Petitioner solely by virtue of the subrogation clauses contained within their respective contracts of insurance entered into with Weslo, Inc. and Urban Industries, Inc. If the Petitioner committed an intentional tort directly against the Respondent insurance carriers, they are unable to name it. Petitioner's alleged intentional tort was not directed toward the insurance companies nor was it directed at a class of persons within which the insurance companies are included. Clearly, any right of action against Petitioner maintained by the Respondent insurance companies is derived solely by contract—the subrogation clause contained within the policies.

Kentucky caselaw indicates that a subrogee may never seek punitive damages. In support of this

proposition, Petitioner cites *Commercial Standard Insurance Co.* v. *American Employers Insurance Co.*, 209 F. 2d 60 (6th Cir. 1954); *New York Underwriters Insurance* v. *L & N*, Ky., 148 S. W. 2d 710 (1941); *Federal Deposit Insurance Co.* v. *Wilhoit*, Ky., 180 S. W. 2d 72 (1943). In each case, the subrogee insurance companies' recovery was limited to the amount it had expended and no more with the singular exception of the interest allowed on recovery in *FDIC* v. *Wilhoit*. Considered collectively, these cases indicate that it is impermissible departure from standard practice in Kentucky to permit an insurance company subrogee to recover punitive damages especially where the subrogor recovers punitive damages within the same suit.

If the complained of opinion is allowed to stand, a new and questionable rule of law would be interjected into the substantive law of Kentucky. This new facet of subrogation could multiply rights and consequently liabilities ad infinitum resulting in a defendants' liability to not one but many plaintiffs. Subrogor or subrogee could assign away some or all of its rights creating within itself and others the right to seek punitive damages from a putative defendant.

The following cases state variously that subrogation is: a right to "recoup," *Ky. Farm Bureau Mutual Ins. Co.* v. *Conley*, Ky., 498 S. W. 2d 122, 125 (1973); a right to recover "compensation paid" by the insurer, *Hughett* v. *Ohio Barge Lines, Inc.*, Ky., 495 S. W. 2d 184, 195-196 (1973), and *Scudamore* v. *Horton*, Ky., 426 S. W. 2d 143 (1968); or a right "to the extent of

BRB (a statutory term for compensation) paid," *Fann* v. *McGuffey,* Ky., 534 S. W. 2d 770, 773 (1975).

A recent case demonstrates the clear, sound, and traditional legal maxim that any subrogee's rights are no greater or higher than those of the subrogor.

> It has been held here that although subrogation is a favored remedy, the subrogees' rights arise no higher than those of the subrogor. (Citation omitted) The general rule in this county is that a subrogee is entitled to indemnity only to the extent of the money actually paid to discharge the obligation. 73 AM JUR. 2d, Subrogation, § 114 (1974). *Memphis & L.R.R. Co.* v. *Dow,* 120 U. S. 287, 7 S. Ct. 482, 30 L. Ed. 595 (1886). *Colonial Penn Insurance Co.* v. *Ford & Martin* v. *Ford,* 411 A. 2d 736, 737 (1979).

In the case at bar, not only were the subrogee's rights raised higher than those of the subrogor, but also the subrogor was permitted to maintain those exact same rights at the exact time and in the exact same manner.

The Court in *Colonial Penn Insurance Co., supra,* cited with approval the following language from 83 C.J.S. Subrogation §52:

> [S]ubrogation is limited to indemnification or reimbursement, and a surety will be subrogated to, and can enforce the rights of the creditor only to the extent necessary to obtain reimbursement for the amount which the surety has actually paid. (Citation omitted) *Id.* at 737.

The Court of Appeals recognized the existence of state statutes precluding the recovery of punitive

damages by an insurance company in a situation such as we are herewith confronted. Such a finding should indicate that such awards to an insured and his insurance carrier are disfavored under the law.

This Court of Appeals reasoned, that although there was only one fire, it caused distinct and different injuries to each of the Respondents. It must be noted that Respondent insurance companies sued Petitioner solely by virtue of the subrogation clauses contained in their respective policies.

Ostensibly, the Court of Appeals reasoned that the "distinct" injury to the Respondent insurance companies was the expense they incurred in investigating the circumstances surrounding the fire. Yet, in every case, an insurance company would necessarily investigate. Any such expense incurred does not create a distinct claim for relief. Such an expense could, quite arguably, be an area of damage to be sought pursuant to a subrogation agreement. It does not justify a mammoth award of punitive damages when the insured has likewise sought and has been awarded punitive damages.

The Court failed to distinguish between the parties directly injured by the Petitioner's alleged tortious conduct as opposed to those parties which derive their claim for relief through contractual or conventional subrogation. The Opinion and Order has expanded the rights of insurance companies from complete indemnity through subrogation to that which is impermissibly more complete.

CONCLUSION

For the abovementioned reasons, it is respectfully submitted that the Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the Opinion of the District Court is erroneous and said issue is of far reaching importance. Accordingly, Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-3615

URBAN INDUSTRIES, INC., ET AL., - *Plaintiffs-Appellees,*

v.

MICHAEL THEVIS, - - - - *Defendant-Appellant.*

ORDER—Filed February 9, 1981

Before: LIVELY and KEITH, Circuit Judges and CELEBREZZE, Senior Circuit Judge

On October 2, 1975, Plaintiffs-Appellees, Urban Industries, Inc., Weslo, Inc., and their insurance companies, filed a Complaint in Jefferson County, Kentucky Circuit Court alleging, in part, that Defendant-Appellant Thevis, acting alone or in concert with others, willfully, maliciously and criminally caused a fire to be set at the appellees' address. The case was removed from Jefferson County Circuit Court to the United States District Court for the Western District of Kentucky at Louisville.

The evidence at trial showed that Appellee Thevis, in April 1970, was a producer and seller of adult-oriented materials including books, magazines and paraphernalia. The adult enterprise industry was faced at that time with the advent of a new highly profitable moneymaker in the form of a peep show machine which was used to show adult films. Urban Industries had developed a continuous action no-rewind type machine which it sold to its customers

across the country. Thevis, on the other hand, only rented the similar machines he owned.

The theory at trial was that in April 1970, Thevis, concerned with the competition presented by Urban, instructed his then Lieutenant, Roger Underhill, to dispose of this annoyance by going to Louisville and burning down the Urban Industries business. Thevis arranged the arson. The Urban Industries building was damaged but not totaly destroyed.

In 1975, Thevis was indicted by a federal grand jury in Atlanta, Georgia for conspiring to burn the Urban Industries building on April 27, 1970, and in a separate count on conspiring to burn another retail adult business in Louisville during May 1970. Thevis, in a plea bargaining process pled *nolo contendere* to the count of the indictment charging him with the conspiracy to burn the retail establishment and the counts involving the arson at Urban Industries were dismissed. The appellees-plaintiffs apparently learned of the indictment returned against Thevis and filed the Complaint in the instant action on October 2, 1975.

After jury trial, a verdict in favor of Urban Industries was entered. The verdict included the prayed-for compensatory damages, and also a punitive award to Urban Industries of $200,000.00; a punitive award of $19,332.00 to Weslo, Inc., owner of the building; and a punitive award to the several subrogee insurance companies totalling $408,902.00. The total award was $674,557.54. The appellant filed motions for reconsideration and for judgment notwithstanding the verdict, or in the alternative, for a new trial. These motions were denied and this appeal followed.

Appellant's first assignment of error below is that the district court should have dismissed the Complaint because the statute of limitations had lapsed. The alleged arson

occurred on April 27, 1970. This Complaint was filed on October 2, 1975. The Kentucky Statute of Limitations is five (5) years. The Complaint was filed some seven (7) months after the statute had run. The district court did not dismiss the Complaint because the Kentucky statute has an exception to the time limitation where there has been a fraudulent concealment of the crime. *St. Clair* v. *Bardstown Transfer Line,* 221 S. W. 2d 679 (Ky. 1949). Appellant argues that Kentucky Civil Procedure Rule 4.15 (Unknown Defendant) allows a mechanism for instituting an action within the Statute of Limitations when the identity of the defendant is unknown. Appellant cites no authority for his proposition that this procedural rule overrides the substantive law of Kentucky on the running of the Statute of Limitations. Therefore, we uphold the ruling of the district court on the Statute of Limitations issue.

The appellant's second assignment of error below is that it was prejudicial for the district court to refuse to grant appellant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial because the insurance companies, as subrogees, allegedly were not entitled to the jury's award of punitive damages and because the award was excessive. Under Kentucky law, a jury award of punitive damages must stand if there "was sufficient relationship of the punitive damages to the injury and cause of it to justify the largeness of the verdict." *Hensley* v. *Paul Miller Ford, Inc.,* 508 S. W. 2d 759, 763 (Ky. 1974). We conclude that, insofar as the question of the relationship of the punitive damages to the injury and cause are concerned, the acts performed by Thevis were so outrageous as to justify the largeness of the verdict.

The fact that the amount of the award may not be excessive does not answer the question of whether both the insurance company and the insurer should have received punitive damages. There are no Kentucky cases directly

on point. In some states the insurer cannot receive punitive damages by statute but no such statute exists in Kentucky. The district court allowed punitive damages to both the insured and the insurer because the state case law, while uncertain, leaned toward allowing such awards, and no statute prohibited it. The district court noted that, although there was only one fire, it caused distinct and different injuries to each of the plaintiffs. Weslo, Inc. suffered the loss of a building; Urban Industries suffered the loss of the contents of the building, and in addition, loss of the profits. The insurance companies suffered a loss of funds which they paid their insured, and in addition, have incurred expenses in investigating the circumstances surrounding the fire in order to determine who was responsible for its setting. Therefore, we uphold the punitive damage awards to the insurance companies.

Third, appellant argues that the admission of his *nolo contendere* plea as rebuttal evidence was prejudicial error since Fed. Crim. Proc. Rule 11(e)(6) prohibits use of such pleas for that purpose.

The district court does clearly have broad discretion to allow in the rebuttal testimony. The admission of the plea was proper under Rule 609 of the Federal Rules of Evidence for the purposes of impeachment. Rule 11(e)(6) does not nullify the effect of Rule 609. *See, e.g.*, 3 J. Weinstein, Evidence ¶609 (1975).

Lastly appellant argues that the judgment n.o.v. or a new trial should have been granted because two of appellees' witnesses received $2,000 from appellees in exchange for their testimony at trial.

We agree with the district court that the $2,000 was for expenses and not to influence the testimony of the two men. Also appellant was given opportunity to fully cross-examine the witnesses about the payment and thus to impeach their credibility. The district court was concerned

enough about the possibility of buying testimony that it held an in-chambers proceeding wherein the court and appellant's counsel questioned the witness at length concerning his motives for attendance at the trial and the propriety of the payment to him. The witnesses told the judge that they were required to come a great distance by a circuitous route and that, when all expenses were considered, the payment to them would not represent remuneration beyond the extraordinary expenses they incurred.

The district court judgment upholding the jury verdict and award is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

Issued as Mandate: September 25, 1981
Costs: None

APPENDIX B

MEMORANDUM OPINION—Entered and Filed July 13, 1978

This action is submitted to the Court on the motion of the defendant for a new trial, or for a judgment notwithstanding the verdict, following a trial before a jury which returned a verdict for compensatory damages to each of the six plaintiffs herein in amounts varying from $1,933.22 to $14,873.16, and, in addition, awarding punitive damages to each of the six plaintiffs in amounts varying from $19,932 to $200,000. The punitive damages as to each of the plaintiffs were apparently reached by the jury by multiplying ten times the amount of compensatory damages, with the exception of plaintiff, Urban Industries, Inc., which received punitive damages in the amount of $200,000, as contrasted with a compensatory damage award of $3,500.

In his motion for a new trial or for a judgment notwithstanding the verdict, defendant raises five issues, four of which require no discussion, inasmuch as the Court has previously ruled on them either by order or following a lengthy discussion in chambers.

The fifth issue, however, raises some interesting and novel questions of law. That issue is the one concerning punitive damages. Defendant contends that plaintiff insurance companies, who have sued the defendant by reason of the subrogation clause in their policies, cannot sue for punitive damages. It should be pointed out that defendant made no objection to the instructions given by the Court concerning the rights of the plaintiffs to recover punitive damages, as is required by Rule 51, Federal Rules of Civil Procedure, and, therefore, defendant's only ground for the setting aside of the punitive damage award is the principle that even though a party does not object to a court's in-

struction on a material issue, a new trial may be granted when it is apparent that a miscarriage of justice may otherwise occur. 6A *Moore's Federal Practice,* Sec. 59, pp. 105-107.

In the instant case, defendant was found liable for the burning by arson of a building owned by Weslo, Inc. and leased by Urban Industries, Inc. Pursuant to the subrogation clause of the insurance policies, the plaintiff insurance companies paid plaintiff Weslo, Inc. the stipulated amount of damages to the building owned by Weslo. Plaintiff, Urban Industries, was reimbursed by the plaintiff insurance companies for the damages done to the contents which were damaged or destroyed by the fire. In addition, Uban Industries was awarded compensatory damages for loss of profits sustained as a result of the interruption of production caused by the fire.

This being a diversity case, the Court must apply applicable Kentucky substantive law. See *Erie* v. *Tompkins,* 304 U. S. 64 (1938). No case has been found by the Court which is directly in point, but the latest case pertaining to punitive damages, that of *Hensley* v. *Paul Miller Ford, Inc.,* 508 S. W. 2d 759 (Ky. 1974), sheds considerable light on the Kentucky court's ruling as to punitive damages. In that case, the court held that where a compensatory verdict of $2,103.85 was awarded and punitive damages of $20,000 were awarded, the disproportion of the two verdicts was not to be considered, citing the rule in Kentucky "that an *award* of punitive damages need not bear a proportional relationship to the award of actual damages", citing cases.

The *Hensley* court, however, went on to hold that the trial court was correct in conditionally granting a new trial on the ground that the verdict was excessive. The court said that the trial court had the authority to do so where it found that the verdict was excessive in light of the facts of the case which, in turn, was based on "whether there

was sufficient relationship of the punitive damages to the injury and the cause of it to justify the largeness of the verdict." See 508 S. W. 2d at p. 763. As the court also pointed out there is a well-established rule in Kentucky that a jury has wide discretion in awarding punitive damages, and, therefore, decisions must be made on a case-by-case basis.

In *Hensley, supra,* plaintiff purchased from defendant a 1969 automobile subject to his obtaining a loan. He was to trade in his 1966 automobile. He left the 1966 automobile on the Ford parking lot while he went to see about financing the balance owed. When he returned to the dealer's parking lot about two hours later, he discovered that his car was missing. He testified that the car had been sold by Ford, and subsequently the would-be purchaser of Hensley's car returned it to Ford in a damaged condition and with the personal property missing. Hensley used the 1969 automobile for a few weeks until the dealer repossessed it.

While Ford's conduct in *Hensley, supra,* was reprehensible, it was in no way comparable to the acts in the case at bar of arson performed at the defendant's behest by two felons, who came to Louisville and set fire to the building in the middle of the night. Therefore, we conclude that, insofar as the question of the relationship of the punitive damages to the injury, and the cause of it are concerned, the acts performed by defendant were so outrageous as to justify the largeness of the verdict.

This holding, however, does not dispose of defendant't argument that, in effect, the jury was awarding damages both to the two insureds plaintiffs and to their former insurers, the plaintiff insurance companies, for the same outrageous conduct. Neither the Court nor the parties have been able to come up with any case directly in point from Kentucky. There are, however, several clues as to

what Kentucky's highest court would decide in the event that it was faced with the same question as is the Court here. In *Bratton* v. *Speaks*, 286 S. W. 2d 526 (Ky. 1956), there appears the general statement that an insurance company which pays an insured a loss becomes subrogated to any claim for the same damages which the insured might have recovered from the wrongdoer causing the damages.

In *Federal Deposit Insurance Corporation* v. *Wilhoit, etc.*, 297 Ky. 339 (Ky. 1943), 180 S. W. 2d 72, the court held that the Federal Deposit Insurance Company was subrogated to the rights of the depositors of a closed bank and was entitled to interest on money it had made available to those depositors. The court held that K.R.S. 287.-320 which reads as follows:

> "Whenever any banking institution which is a member of, or whose deposits are insured by, the Federal Deposit Insurance Corporation, has been closed and the Federal Deposit Insurance Corporation pays or makes available for payment the insured deposit liabilities of the closed institution, the corporation shall become subrogated by operation of law to all rights against the closed banking institution of each owner of a claim for deposit to the extent of the payment,"

does not preclude the subrogee from recovering interest on its payments to the depositors, despite the use of the phrase "to the extent of the payment."

We take note also that under applicable statutes the then Kentucky Court of Appeals held in *Taylor* v. *Dorman, State Banking Securities Commissioner*, 279 Ky. 109, 210 S. W. 219 (Ky. 1939), that the F.D.I.C. was entitled to enforce the payment of individual double liability of stockholders in its favor as subrogee of the depositors.

These two cases indicate that Kentucky has no policy against the recovery of damages over and above compensa-

tory damages by a subrogee. It is true that these cases were decided under particular statutes and did not involve the award of punitive damages. We believe, however, that in Kentucky there exists on prohibition against the recovery of punitive damages by an insurance company subrogee.

One other observation is pertinent. It should be observed that, although there was only one fire, it caused distinct and different injuries to each of the plaintiffs. Weslo, Inc. suffered the loss of a building; Urban Industries, Inc. suffered the loss of the contents of the building and, in addition, a loss of profits. The insurance companies suffered a loss of funds which they paid their insureds, and, in addition, have incurred expenses in investigating the circumstances surrounding the fire in order to determine who was responsible for its setting.

There are no cases specifically deciding this issue, although the Court's attention has been called to *Davidson* v. *Dixon,* 386 F. Supp. 482 (D.C. Del. 1974), aff'd. 529 F. 2d 511 (3rd Cir. 1975), where the court awarded $500 punitive damages against each of three defendants because of their unlawful beating of the plaintiff while he was a prison inmate. In that case, the district court held that it was the duty of the court to examine individually each defendant's degree of participation in the beating.

The defendant has cited *Maryland Casualty Company* v. *Brown,* 321 F. Supp. 309 (N.D. Ga. 1971) and *Commercial Union Insurance Company* v. *Upjohn Company,* 409 F. Supp. 453 (W.D. La. 1976), as authority for the proposition that insurance companies, acting as the subrogee may recover only indemnification and not punitive damages. In both Georgia and Louisiana there were statutes to the effect that punitive damages were not allowable. It is true that in *Brown, supra,* the court stated, in effect, that a subrogated insurer sues for its own use and not for the use of

its insured, and is equitably entitled to recover only that which it has paid out, 321 F. Supp. at pp. 311,312.

Defendant also relies on 73 Am. Jur. 2d, Subrogation Section 115, which states that a subrogee is entitled to reimbursement of whatever amount it pays and only that amount. If Kentucky subscribed to that principle, that would be the end of the matter, and defendant would clearly be correct. However, the Kentucky court, in the case of *Federal Deposit Insurance Corporation* v. *Wilhoit, etc., supra,* at p. 348, seems to have taken the view that an insurance company subrogee may recover over and beyond the amount which it paid its subrogor. As stated before, none of the cases cited either by the Court or by the defendant are controlling precedent.

The case at bar, insofar as it pertains to punitive damages, is and will probably continue to be unique, for this Court knows of no instance where an insurance company has been awarded punitive damages and where its insured also has been awarded such damages.

We have this day entered our order overruling the motion of the defendant for a new trial, or, in the alternative, for a judgment notwithstanding the verdict.

(s) Charles M. Allen
United States District Judge

Dated 7/13/78

ORDER—Entered and Filed July 13, 1978

Defendant, having moved for a new trial, or, in the alternative, for a judgment notwithstanding the verdict, and the Court, having filed its memorandum opinion and being fully advised in the premises,

It Is Ordered that the motions of the defendant be and they are hereby overruled.

(s) Charles M. Allen
United States District Judge

Dated 7/13/78

Opposition

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81-898

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL THEVIS - - - - - Petitioner

versus

URBAN INDUSTRIES, INC.,
WESLO, INC.,
MERCHANTS AND BUSINESSMENS
MUTUAL INSURANCE CO.,
BITUMINOUS CASUALTY CORP.,
FIREMAN'S FUND INSURANCE CO., and
NEWARK INSURANCE CO. - - Respondents

RESPONSE TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

81-898

MICHAEL THEVIS - - - - - *Petitioner*

v.

URBAN INDUSTRIES, INC.,
WESLO, INC.,
MERCHANTS AND BUSINESSMENS
MUTUAL INSURANCE CO.,
BITUMINOUS CASUALTY CORP.,
FIREMAN'S FUND INSURANCE CO., and
NEWARK INSURANCE CO. - - - *Respondents*

RESPONSE TO PETITION FOR CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner cites the Fifth Amendment to the United States Constitution as a constitutional provision involved in this case presumably pursuant to Rule 34(f) of the rules of this Court, but fails to make any mention of the Amendment elsewhere in his petition nor does the petitioner make any argument or cite any authority that his Fifth Amendment rights have been violated in the proceedings below.

The respondents, Weslo, Inc., Merchants and Businessmens Mutual Insurance Co., Bituminous Casualty Corp., Fireman's Fund Insurance Co., and Newark Insurance Co., for their response to the Petition for

Certiorari herein respectfully request this Court to deny said petition for the reasons set out below.[1]

STATEMENT OF THE CASE

This case commenced when the respondents filed a Complaint in October, 1975, later amended, claiming compensatory and punitive damages from the petitioner, Michael Thevis, by reason of willful, malicious and criminal acts perpetrated by the petitioner in burning a building in 1970 owned by the respondent, Weslo, Inc., and occupied by the respondent, Urban Industries, Inc., as a tenant. The insurance company respondents insured the building owned by Weslo, and the contents owned by Urban and upon paying their respective insureds they sued in subrogation while the building owner, Weslo, sued for its uninsured loss as did the tenant, Urban.

Proof at the trial showed that the petitioner, who was characterized by his counsel during closing argu-

[1]Pursuant to Rule 28.1 of the rules of this Court the respondent, Bituminous Casualty Corp. is a part of the Bituminous Insurance Group which includes its affiliate, Bituminous Fire & Marine Insurance Company; Fireman's Fund Insurance Co. is a member of a group which includes its affiliates, Associated Indemnity Corp., Fireman's Fund American Life Insurance Company, Fireman's Fund Insurance Company of Texas, National Surety Corporation, American Automobile Insurance Company and the American Insurance Company, and all of such companies are owned by American Express Company, and Newark Insurance Company is part of an insurance group known as Royal-Globe Insurance Companies which includes its affiliates, American & Foreign Insurance Company, Globe Indemnity Company, Royal Insurance Company of America, Royal Indemnity Company and Safeguard Insurance Company.

ment as the "General Motors" of adult enterprises dispatched three thugs from Atlanta, Georgia to Louisville, Kentucky in April, 1970 with orders to burn down the building and contents occupied by Urban as a manufacturing facility and which was producing movie machines sold in competition with similar machines produced by Mr. Thevis and sold or rented on a national scale to owners and operators of arcades and adult oriented establishments.

The nature of the crime against these respondents, as testified to at the trial by two of the hired thugs involved, was aggravated. Seven five-gallon cans full of gasoline were partially emptied throughout the premises and then strategically placed in a partially full condition at various points with the expectation that when fire communicated to the cans they would explode with a force equal to, according to an expert witness, one and one-half to two sticks of dynamite each. Firefighters were spared the results of these overgrown Molotov cocktails only because the felons used latex paint thinking it was an oil base material, to communicate the fire from one point to another in the building. As a result the building was damaged but not destroyed.

At the conclusion of the evidence the jury was instructed on compensatory and punitive damages without objection on the part of counsel for the petitioner herein, and brought back its verdict awarding each of the insurance company respondents and Weslo, Inc. compensatory damages plus punitive damage equal to, in each case, ten times compensatory damages.

Both the district court (Petitioner's Brief, p. 24) and the Court of Appeals for the Sixth Circuit (Petitioner's Brief, p. 19) held that the acts performed by Thevis were "so outrageous" as to justify the amount of the punitive awards and, although the petitioner does not seek review of the amount of punitive damages adjudged below in this case, the tenor of his petition includes numerous references to the "massive award" of punitive damages would indicate that this is the nexus of his complaint to this Court.

SUMMARY OF ARGUMENT

The question presented by the petitioner is solely involved with an interpretation of the substantive law of the Commonwealth of Kentucky, was correctly decided by both the District Court and the Court of Appeals below, and should not be accepted for review by this Court.

ARGUMENT

The petitioner concedes on page 12 of his brief that the issue of law presented in his petition is a matter involving the substantive law of Kentucky.

The petitioner concedes on pages 6 and 7 of his petition the punitive damages are ordinarily permitted under appropriate facts in Kentucky for the purposes of (1) punishing the defendant and (2) deterring the defendant and others similarly inclined from outrageous conduct in the future. *Ashland Dry Goods Co.* v. *Wages,* Ky., 195 S. W. 2d 312 (1946).

The petitioner concedes on pages 13 and 14 of his petition, as the District Court recognized on the last page of his Opinion (Petitioner's Brief, p. 27), that some states may by statute or otherwise deny insurance companies suing under their subrogation rights an instruction on punitive damages, but that Kentucky has no statute or statement of public policy against the award of punitive damages to insurance companies in circumstances such as those presented in the instant case.

The petitioner's sole appeal to this Court is that both of the courts below misconstrued the existing authority in Kentucky as permitting punitive damages to these respondents. If these respondents have not incorrectly characterized the question presented, it would appear that the issue is not one subject to review by this Court under the cases construing 28 U.S.C. § 1254 (1) or Rule 17 of this Court but, leaving that consideration where it belongs, with this Honorable Court, the decisions below correctly construed the law of Kentucky.

First, applying simple logic it would seem that the purpose of the award of punitive damages under the law of Kentucky, as set out in the *Ashland Dry Goods Co.* case, *supra,* page 315, namely, to punish and deter, are served as well by the award of punitive damages to insurance companies suing in subrogation as to any other plaintiff. The horrible ramifications of the result below put forth by the petitioner, namely, that a defendant committing the sort of outrageous acts committed by this petitioner might be liable to "not one

but many plaintiffs" (Petition, p. 12) seem to be less onerous that those which would result from the holding sought by petitioner. If, for instance, respondents, Urban and Weslo, had been fully insured, they would not have been parties to the action which would have been brought solely by the insurance companies and, according to the petitioner's argument, Mr. Thevis would have escaped all liability for punitive damages.

The case law in Kentucky supports the result below.

The petitioner cites *Commercial Standard Ins. Co.* v. *American Employers Ins. Co.*, 209 F. 2d 60 (6th Cir. 1954), *New York Underwriters Ins.* v. *L&N*, Ky., 148 S. W. 2d 710 (1941) and *Federal Deposit Ins. Co.* v. *Wilhoit*, Ky., 180 S. W. 2d 72 (1943) for support that the law of Kentucky prohibits an insurance company from recovering any amount above that which it paid to its insured. The defendant misrepresents the holdings in all of these cases. As the District Court pointed out (Petition, p. 25) the *Federal Deposit* case in fact supports the conclusion that Kentucky law does not prohibit recovery of punitive damages by insurance companies and other subrogees. In that case, the FDIC was subrogated to the claims of depositors when it paid under its insurance contract. The court did not limit the FDIC-subrogee's recovery to its out-of-pocket expenses, but rather allowed it to recover interest on its compensatory damages. The court in discussing the doctrine of subrogation in *Federal Deposit* explained:

> It is true that the equitable doctrine of subrogation is enforced solely for the purpose of accomplishing ends of substantial justice and that there is no inexorable rule by which the right is to be measured. So a court of equity may cut down or lessen rights of the subrogee, as by denying interest, or may even bar subrogation all together. However, generally the subrogee is placed in the shoes or in the precise position of one to whose rights he is subrogated and is entitled *to all legal rights and remedies to the creditor.* [180 S. W. 2d at 76; emphasis added.]

In addition, under an applicable Kentucky statute, the highest court of Kentucky, then the Kentucky Court of Appeals, held in *Taylor* v. *Dorman, State Banking Securities Commission,* 279 Ky. 109, 210 S. W. 219 (1939) that the FDIC upon paying depositors was entitled to enforce the payment by stockholders, in their individual capacity, of double liability provided by the statute. The FDIC was, hence, permitted to exact, as a subrogee of the depositors, statutory punitive damages from the shareholders of the Bank.

The two additional cases cited by petitioner, *Commercial Standard* and *New York Underwriters, supra,* have no relevance whatsoever to the case at bar. In the former the Court of Appeals for the Sixth Circuit held that where two insurance companies both issued liability policies to the same insured and one company paid the full extent of the insured's liability to a third party, such company became subrogated to the rights of the insured against the second insurance

company and was not barred by the principle that it was a volunteer. In the *New York Underwriters* case, an insured paid farmers $625.00 for damage caused by a railroad to tobacco which had an undisputed value of $1,700.00. The Railroad paid the farmers $670.00 in exchange for a complete release. The insurance company sued the Railroad in subrogation and the court reformed the release to permit the insurance company to recover, holding that the insured could not by release preclude the insurance company from pursuing its subrogation rights.

The respondents would concede, as recognized by the District Court in its Opinion, that in some states, Georgia and Louisiana, for instance, there may be statutes prohibiting punitive damages to insurance companies, but Kentucky is not the only state that permits punitive damages to subrogees. In *State Ex. Rel. Smith* v. *Greene,* Mo., 494 S. W. 2d 55, the Missouri court held that an action by an administrator for the destruction of his decedent's personal property included the right to punitive damages if the cause of action for compensatory damages survived. To the same effect is *Dunshee* v. *Standard Oil Company,* 165 Iowa 625, 169 N. W. 830, holding that the assignee of a right of action based on willful tort, unfair competition and antitrust violations received the right not only to compensatory but to punitive damages.

CONCLUSION

The question presented by the petition is directed solely to the interpretation by the courts below of the substantive law of Kentucky, the issue was correctly decided by the District Court and the Court of Appeals and it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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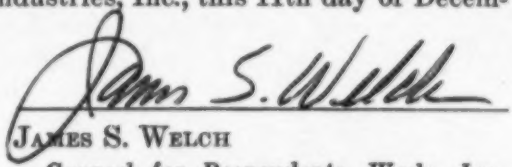
CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing were served by mail upon each of Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202, counsel for petitioner, and Karl N. Victor, Jr., Marion E. Taylor Building, Louisville, Kentucky 40202, counsel for respondent, Urban Industries, Inc., this 11th day of December, 1981.



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